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RECD SEP 27 2004

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9 JUDICIAL COUNCIL OF THE STATE OF CALIFORNIA

10 Coordination Proceeding  
Special Title (Rule 1550(b))

JUDICIAL COUNCIL  
COORDINATION PROCEEDING  
NO. 4365

11  
12 MARRIAGE CASES

13 NOTICE OF LODGING OF  
14 "MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
15 OF PETITION FOR WRIT OF  
MANDATE OR PROHIBITION" BY  
16 THE PETITIONERS IN THE  
TYLER-OLSON ACTION (LASC  
CASE NO. BC 088 506) FOR  
17 RESPONSE IN THE  
COORDINATED MARRIAGE  
CASES PROCEEDING

18 ROBIN TYLER, an individual, DIANE  
19 OLSON, an individual, TROY PERRY, an  
individual, and PHILLIP De BLIECK, an  
individual,

20 Petitioners,

*Coordination Judge: Richard A.  
Kramer  
Dept: "304"*

21 vs.

22 THE COUNTY OF LOS ANGELES, a  
Political Body acting through its Registrar-  
Recorder/County Clerk, and DOES 1 through  
100, inclusive,


23 Defendants.

1 In accordance with permission granted by the Coordination Judge in the Marriage  
2 Cases (Judicial Council Coordination Proceeding No. 4365) for parties in that coordinated  
3 proceeding to file briefs for response by the State of California in *Woo v. State of California*  
4 (*Lockyer*), CPF-04 504 038, the Petitioners in Los Angeles Superior Court Case no. BC 088  
5 506 (Robin Tyler, Diane Olson, Troy Perry, and Phillip De Blieck), hereby lodge their  
6 "Petitioners Memorandum of Points and Authorities in Support of Petition for Writ of  
7 Mandate or Prohibition", previously filed in Los Angeles Superior Court Case no. BC 088  
8 506, in *Woo v. State of California* for response by the State of California. A true and correct  
9 copy of said "Petitioners Memorandum of Points and Authorities in Support of Petition for  
10 Writ of Mandate or Prohibition" is attached as Exhibit "A" hereto.

11 Respectfully submitted,

12 Dated: September 20, 2004

ALLRED, MAROKO & GOLDBERG  
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15 By:   
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17 TYLER, DIANE OLSON, TROY PERRY, and  
18 PHILLIP De BLIECK

**EXHIBIT A**

FEB 27 2004

John A. Clarke, Executive Officer/Clerk

By PETER ONTIVEROS Deputy

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Attorneys for PETITIONERS ROBIN TYLER, DIANE OLSON, TROY PERRY,  
PHILLIP De BLIECK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

ROBIN TYLER, an individual, DIANE OLSON, an individual, TROY PERRY, an individual, and PHILLIP De BLIECK, an individual,

Petitioners,

vs.

THE COUNTY OF LOS ANGELES, a Political Body acting through its Registrar-Recorder/County Clerk, and DOES 1 through 100, inclusive,

Defendants.

CASE NO: BS 088 506

PETITIONERS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE OR PROHIBITION

[Code of Civil Procedure Sections 1085, 1086, 1102, 1103]

Date: March 30, 2004  
Time: 9:30 a.m.  
Dept: "86"/Hon. David P. Yaffe

TO THE HONORABLE COURT, AND TO RESPONDENTS:

Petitioners Robin Tyler, Diane Olson, Troy Perry, and Phillip De Blieck hereby file the following Memorandum of Points and Authorities in Support of their pending Petition for Writ of Mandate or Prohibition.

DATED: February 27, 2004

ALLRED, MAROKO & GOLDBERG  
GLORIA ALLRED  
MICHAEL MAROKO  
JOHN STEVEN WEST

*Gloria Allred*

GLORIA ALLRED, Attorneys for Petitioners  
ROBIN TYLER, DIANE OLSON, TROY PERRY, and PHILLIP De BLIECK

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 STATEMENT OF FACTS

4 (A) Introduction

5 The Courts of the State of California have recognized that the State has  
6 a vital interest in the institution of marriage. See, e.g., Estate of DePasse, 97 Cal.App. 4th 92,  
7 118 Cal.Rptr. 2d 143 (2002). As long ago as 1948, the California Supreme Court in Perez v.  
8 Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948) recognized that the right to marry the person of  
9 one's choice is as fundamental as the right to have children, and is one of the basic civil rights  
10 of all persons. In fact, the right to marry is so fundamental that it is even guaranteed to  
11 prisoners. In re Carrafa, 77 Cal.App.3d 788, 789, 143 Cal.Rptr. 848, 849 (1978).

12 In Los Angeles County, however, same sex couples, no matter how committed or law  
13 abiding, cannot marry because the Los Angeles County Clerk maintains a policy of refusing to  
14 issue marriage licenses to such couples. This mandamus proceeding seeks to end that policy,  
15 and to declare that the statutes upon which it is based are unconstitutional.

16 The Petitioners in this case comprise two same sex couples who desire the benefits and  
17 legal status of marriage under California law. They brought this mandamus proceeding after  
18 the County Clerk refused to issue marriage licenses to them.

19 By means of the discussion to follow, the Petitioners will show that the County's  
20 policy of denying marriage licenses to same sex couples, and the provisions of Sections 300  
21 and 308.5 of the California Family Code, operate as (1) a denial of the equal protection  
22 guaranties embodied in Article I, Section 7 of the California Constitution, (2) a denial of the  
23 "inalienable" right to "acquiring, possessing and protecting property, and pursuing and  
24 obtaining...happiness and privacy" embodied in Article I, Section 1 of the California  
25 Constitution, and (3) a violation of substantive due process rights inherent in our State  
26 Constitution. The Petitioners therefore seek issuance of a writ of mandamus commanding the  
27 Los Angeles County Clerk to issue marriage licenses to the Petitioners, and to other same-sex  
28

1 couples who are otherwise qualified to issuance of such licenses. <sup>1</sup>

2 (B) Relevant facts

3 Petitioners Robin Tyler and Diane Olson are both females who reside in Los Angeles  
4 County. The two of them have been deeply committed to one another for an  
5 extended period of time, and over that time have enjoyed a stable and monogamous  
6 relationship.

7 Petitioners Troy Perry and Phillip De Blicck are both males who reside in Los Angeles  
8 County. They too have been deeply committed to one another for an extended period of time,  
9 and have a stable and monogamous relationship. In fact, Mssrs. Perry and De Blicck went  
10 through a civil marriage ceremony in Canada, and are considered married to each other under  
11 the law of that country.

12 Both couples desire to become married. On February 12, 2004, the two couples (Tyler  
13 and Olson, on one hand, and Perry and DeBlicck, on the other hand) went to the Office of the  
14 County Clerk in Beverly Hills, California for the purpose of obtaining marriage licenses. Both  
15 couples requested marriage license applications from a representative of the County Clerk,  
16 and were provided with the application forms utilized by the Clerk's office. As couples, they  
17 filled out the application forms and handed those forms back to the Clerk's representative.

18 The Clerk's representative refused to accept the completed marriage license  
19 applications, and handed each couple (Tyler and Olson, on one hand, and Perry and DeBlicck,  
20 on the other hand) a form which said that under State law, "marriage" is between a man and a  
21 woman. In that manner, the Petitioners were denied issuance of marriage licenses. Plainly, the  
22 denials were final, and were based solely upon the fact that the Petitioners constituted same  
23 sex couples.

24 \_\_\_\_\_  
25 <sup>1</sup> In the alternative, Petitioners seek issuance of an injunction (a) enjoining defendants from  
26 enforcing their policy of refusing to issue marriage licenses to same sex couples otherwise  
27 qualified for issuance of such licenses, and/or (b) requiring Respondents to issue marriage licenses  
28 to the Petitioners, and/or (c) requiring Respondents to issue marriage licenses to other same-sex  
couples who are otherwise qualified to issuance of such licenses;

1 Pursuant to the provisions of California Family Code section 350, persons who  
2 wish to enter into marriage under the laws of this state “shall *first* obtain a marriage license  
3 from the County Clerk.” Family Code section 300 defines “marriage” as “a personal relation  
4 arising out of a civil contract between a man and a woman, to which the consent of the parties  
5 capable of making that contract is necessary. Consent alone does not constitute marriage.  
6 Consent must be followed by the issuance of a license and solemnization as authorized by this  
7 division...”<sup>2</sup> Thus, the refusal of the County Clerk to issue marriage licenses to the two  
8 couples in question prevents them from becoming legally married in the County of Los  
9 Angeles.

## 10 II.

### 11 MANDAMUS IS APPROPRIATE WHEN A GOVERNMENTAL ORGAN ACTS IN 12 AN UNCONSTITUTIONAL MANNER

#### 13 (A) Standards for Issuance of Mandamus

14 “A writ of mandate will lie to “compel the performance of an act which the law  
15 specifically enjoins, as a duty resulting from an office, trust, or station” (Code.Civ.Proc., §  
16 1085) “upon the verified petition of the party beneficially interested,” in cases “where there is  
17 not a plain, speedy, and adequate remedy, in the ordinary course of law.” (Code Civ. Proc., §  
18 1086.) The writ will issue against a county, city or other public body or against a public  
19 officer. (citations omitted) However, the writ will not lie to control discretion conferred upon  
20 a public officer or agency. (citations omitted) Two basic requirements are essential to the  
21 issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the  
22 respondent (citations omitted); and (2) a clear, present and beneficial right in the petitioner to  
23 the performance of that duty (citation omitted.) ...’ (Citations omitted).” Venice Town

24 \_\_\_\_\_  
25 <sup>2</sup> Also relevant in the case of petitioners Perry and DeBlieck are sections 308 and 308.5 of  
26 the Family Code. Section 308 states as follows: “A marriage contracted outside this state that  
27 would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this  
28 state.” That statute does not, however, validate their Canadian marriage in California because  
Family Code section 308.5 provides: “Only marriage between a man and a woman is valid or  
recognized in California.”

1 Council, Inc. v. City of Los Angeles, 47 Cal.App.4th 1547, 1558, 55 Cal.Rptr.2d 465, 472-3  
2 (1996).

3 (B) Mandamus is appropriate to challenge the constitutionality of official acts  
4 and statutes.

5 Mandamus is “an appropriate vehicle for challenging the constitutionality of statutes  
6 and official acts.” Hoffman v. State Bar of California, 113 Cal.App.4th 630, 639, 6  
7 Cal.Rptr.3d 592, 598 (2003). “Where the constitutionality of official acts is called into  
8 question, mandamus is proper.” Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals  
9 Bd., 103 Cal.App.3d 1001, 1009, 163 Cal.Rptr. 339, 343 (1980).

10 In Danskin v. San Diego Unified School District, 28 Cal.2d 536, 171 P.2d 885 (1946),  
11 for example, the Supreme Court held that members of the San Diego Civil Liberties  
12 Committee were entitled to a writ of mandamus compelling a school board to grant them  
13 permission to use an auditorium for a meeting. The school board had denied that permission  
14 because the petitioners would not execute an oath stating that they (petitioners) were not  
15 affiliated with any organization which advocated the overthrow of the government by force or  
16 unlawful means. At the time, Education Code section 19432 declared as a “subversive  
17 element” any person or group “which has as its object...the overthrow or the advocacy of the  
18 overthrow of the...government...by force, violence, or other unlawful means...,” and that  
19 statute barred such persons from use of any school auditorium.

20 In their mandamus proceeding, the petitioners asserted that then section 19432 of the  
21 Education Code violated their rights of free speech and peaceable assembly under both the  
22 state and federal constitutions. After reviewing relevant authorities, the Supreme Court held  
23 that “[s]ince the state cannot compel 'subversive elements' directly to renounce their  
24 convictions and affiliations, it cannot make such a renunciation a condition of receiving the  
25 privilege of free assembly in a school building” and, therefore, that such a condition was  
26 unconstitutional. 28 Cal.2d at 546 , 171 P.2d at 891. On that basis, the Supreme Court held  
27 that the petitioners were entitled to issuance of a peremptory writ.

28

1 The petitioners in the present proceeding will establish that they have been denied the  
2 fundamental right to marry the person of their choice as a result of a policy and/or statutes that  
3 are unconstitutional. Under these circumstances, mandamus is both appropriate and required.<sup>3</sup>

4 III.

5 THE REFUSAL OF THE COUNTY CLERK TO ISSUE MARRIAGE LICENSES TO  
6 THE PETITIONERS CONSTITUTES A CLEAR DENIAL OF THE GUARANTEES  
7 OF EQUAL PROTECTION EMBODIED IN THE CALIFORNIA CONSTITUTION  
8 UNDER THE CIRCUMSTANCES, PETITIONERS ARE ENTITLED TO ISSUANCE  
9 OF A WRIT OF MANDAMUS.

10 (A) The right to marry the person of one's choice is a fundamental  
11 constitutional right.

12 "The right to marry is as fundamental as the right to send one's child to a particular  
13 school or the right to have offspring. Indeed, 'We are dealing here with legislation which  
14 involves one of the basic civil rights of man. Marriage and procreation are fundamental to the  
15 very existence and survival of the race.' (Citation omitted) Legislation infringing such rights  
16 must be based upon more than prejudice and must be free from oppressive discrimination to  
17 comply with the constitutional requirements of due process and equal protection of the laws."  
18 Perez v. Lippold, 32 Cal.2d 711, 715, 198 P.2d 17, 19 (1948).

19 In Perez v. Lippold, the Supreme Court determined that mandamus should issue to  
20 compel the Los Angeles County Clerk to issue a marriage license to an interracial couple who

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21  
22 <sup>3</sup> "Prohibitory mandate is typically invoked in two situations: where the official's conduct is  
23 in violation of a statutory ministerial duty, and where the performance of a statutory ministerial  
24 duty would violate the constitution...Prohibitory mandate has also been used to restrain state  
25 officials from enforcing ministerial statutory provisions found to be unconstitutional. (Citations  
26 omitted) The writ has been repeatedly employed in sexual privacy cases to restrain the  
27 enforcement of unconstitutional provisions of law. (Citations omitted) Since petitioners contend  
the Attorney General is enforcing the reporting law in a manner not intended or authorized  
by the Legislature and not permitted by the constitution, they may avail themselves of prohibitory  
mandate." Planned Parenthood Affiliates v. Van de Kamp, 181 Cal.App.3d 245, 263, 226  
Cal.Rptr. 361, 368 (1986).

1 wanted to marry. The setting and legal analysis in that case bear a striking resemblance to the  
2 case now before the Los Angeles Superior Court. In that case, the petitioners were a white  
3 female and a black male who were denied a marriage license by the Los Angeles County  
4 Clerk. The County Clerk refused to issue them a marriage license based upon former Civil  
5 Code section 69, which then provided as follows: "... no license may be issued authorizing the  
6 marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."  
7 A related statute then in force, Civil Code section 60, provided that "[a]ll marriages of white  
8 persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and  
9 void."

10 At the outset of its analysis, the Supreme Court made the pronouncements quoted  
11 above, regarding the "fundamental" nature of the "right to marry" as a "basic civil right of  
12 man." Then, in language directly applicable to the dispute now before the Superior Court, the  
13 Supreme Court held as follows: "Since *the right to marry is the right to join in marriage*  
14 *with the person of one's choice*, a statute that prohibits an individual from marrying a  
15 member of a race other than his own restricts the scope of his choice and thereby restricts his  
16 right to marry." 32 Cal.2d at 715, 198 P.2d at 19. (Emphasis added).

17 The statutes in question were then analyzed in terms of the equal protection clause of  
18 the United States Constitution. "It must therefore be determined whether the state can restrict  
19 that right on the basis of race alone without violating the equal protection of the laws clause of  
20 the United States Constitution." 32 Cal.2d at 715, 198 P.2d at 19. The Court then went  
21 through the various purported reasons for race-based restrictions, and rejected each one of  
22 them. "Careful examination of the arguments in support of the legislation in question reveals  
23 that 'there is absent the compelling justification which would be needed to sustain  
24 discrimination of that nature.' (Citation omitted) *Certainly the fact alone that the*  
25 *discrimination has been sanctioned by the state for many years does not supply such*  
26 *justification.*" 32 Cal.2d at 727, 198 P.2d at 27. (Emphasis added).

27 The Supreme Court went on to conclude that the statutes in question, which barred  
28

1 members of different races from intermarrying, violated the equal protection clause of the  
2 United States Constitution by (a) impairing the right of individuals to marry on the basis of  
3 race alone, and (b) by arbitrarily and unreasonably discriminating against certain racial groups.  
4 On that basis, the Court held that mandamus should issue.

5 Since Perez was decided, the Courts of this State have consistently upheld the  
6 fundamental nature of the constitutional right to privacy. See, e.g., Conservatorship of Valerie  
7 N., 40 Cal.3d 143, 161, 219 Cal.Rptr. 387, 399 (1985) (“The right to marriage and procreation  
8 are now recognized as fundamental, constitutionally protected interests.”); Williams v.  
9 Garcetti, 5 Cal.4th 561, 577, 20 Cal.Rptr.2d 341, 350 (1993) (“[W]e have already recognized  
10 that ‘[t]he concept of personal liberties and fundamental human rights entitled to protection  
11 against overbroad intrusion or regulation by government ... extends to ... [citations] such basic  
12 liberties and rights not explicitly listed in the Constitution [as] the right ‘to marry, establish a  
13 home and bring up children’... and the right to privacy and to be let alone by the government  
14 in ‘the private realm of family life.’”); People v. Belous, 71 Cal.2d 954, 963, 80 Cal.Rptr.  
15 354, 359 (1969)(“The fundamental right of the woman to choose whether to bear children  
16 follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of  
17 privacy' or 'liberty' in matters related to marriage, family, and sex.”).

18 In Ortiz v. Los Angeles Police Relief Ass'n, 98 Cal.App.4th 1288, 120 Cal.Rptr.2d 670  
19 (2002), the Court of Appeal discussed the right to marry in the context of Article I, Section 1  
20 of the California Constitution, which provides as follows: “All people are by nature free and  
21 independent and have inalienable rights. Among these are enjoying and defending life and  
22 liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety,  
23 happiness, and privacy.” According to Ortiz, “[t]he constitutional right of privacy under state  
24 law is quite broad. In addition to the right of personal autonomy and the protection of private  
25 information, the state Constitution ensures the freedom of association.” 98 Cal.App.4th at  
26 1302-3, 120 Cal.Rptr.2d at 677-8. Ortiz cited earlier Supreme Court opinions for the  
27 proposition that the Article I, section 1 right of privacy encompasses “the right to freely  
28

1 associate.” That right protects “*highly personal relationships*...exemplified by ‘those that  
2 attend the creation and sustenance of a family-- *marriage* ..., childbirth ..., the raising and  
3 education of children ... and cohabitation with one's relatives.’” *Id.* Given the language of  
4 Article I, section 1 and the importance of the rights protected by that provision, the *Ortiz* court  
5 stated that “*the Constitution undoubtedly imposes constraints on the State's power to*  
6 *control the selection of one's spouse that would not apply to regulations affecting the*  
7 *choice of one's fellow employees.*” 98 Cal.App.4th at 1302-3, 120 Cal.Rptr.2d at 677-8.  
8 (Emphasis added).

9 (B) The Equal Protection Clause of the California Constitution requires that  
10 all persons enjoy the same protection of the laws enjoyed by others similarly situated.

11 Article I, Section 7 of the California Constitution provides in relevant part as follows:  
12 “A person may not be...denied equal protection of the laws...” “[T]he equal protection clause  
13 in the California Constitution has been construed to apply to homosexuals.” *Citizens for*  
14 *Responsible Behavior v. Superior Court*, 1 Cal.App.4th 1013, 1025, 2 Cal.Rptr.2d 648, 654  
15 (1992).

16 “Equal protection requires ‘that persons similarly situated with respect to the  
17 legitimate purpose of the law receive like treatment.’” *Creighton v. Regents of University of*  
18 *California*, 58 Cal.App.4th 237, 246, 68 Cal.Rptr.2d 125, 130 (1997). “Concededly a law  
19 which confers particular privileges or imposes peculiar disabilities upon an arbitrarily selected  
20 class of persons who stand in precisely the same relation to the subject matter of the law as  
21 does the larger group from which they are segregated constitutes a special law which is  
22 tantamount to a denial of equal protection.” *California Federation of Teachers, AFL-CIO v.*  
23 *Oxnard Elementary Schools*, 272 Cal.App.2d 514, 527, 77 Cal.Rptr. 497, 509 (1969).

24 “The equal protection guarantees of the Fourteenth Amendment and the California  
25 Constitution are substantially equivalent and analyzed in a similar fashion. (Citations omitted)

26 ‘The constitutional guarantee of equal protection of the laws has been judicially defined to  
27 mean that no person or class of persons shall be denied the same protection of the laws which  
28

1 is enjoyed by other persons or other classes in like circumstances in their lives, liberty and  
2 property and in their pursuit of happiness. [Citations.]’ (citation omitted) The concept  
3 recognizes that persons similarly situated not be treated differently unless the disparity is  
4 justified.” People v. Leng, 71 Cal.App.4th 1, 11, 83 Cal.Rptr.2d 433, 439-440 (1999).

5 (C) **Because the right to marry is fundamental, any classification infringing**  
6 **upon that right must pass a strict scrutiny test.**

7 “In considering an equal protection challenge, we must first determine the appropriate  
8 standard of review, which depends upon the classification involved in, and the interests  
9 affected by, the challenged law. (Citations omitted) Personal liberty is *a fundamental right,*  
10 *and a classification infringing on such a right is subject to strict judicial scrutiny.*

11 (Citations omitted) Under this very severe standard, a discriminatory law will not be given  
12 effect unless the state establishes the classification bears a close relation to the promotion of a  
13 compelling state interest, the classification is necessary to achieve the government's goal, and  
14 the classification is narrowly drawn to achieve the goal by the least restrictive means  
15 possible.” People v. Leng, 71 Cal.App.4th 1, 11, 83 Cal.Rptr.2d 433, 440 (1999). (emphasis  
16 added).

17 It is beyond dispute that the right to marry is both fundamental and constitutionally  
18 protected. As noted so eloquently by the Supreme Court in Perez, “[t]he right to marry is as  
19 fundamental as the right to send one's child to a particular school or the right to have  
20 offspring”, and is “one of the basic civil rights of man.” Perez v. Lippold, 32 Cal.2d at 715,  
21 198 P.2d at 19. (See, also, Conservatorship of Valerie N., *supra*, Williams v. Garcetti, *supra*,  
22 and People v. Belous, *supra*). “*Under California law, classifications based on gender are*  
23 *considered suspect for purposes of equal protection analysis.*” Connerly v. State Personnel  
24 Bd., 92 Cal.App.4th 16, 32, 112 Cal.Rptr.2d 5, 19 (2001). (emphasis added).

25 ///

26 ///

27 ///

1           (D)    The policy of the Los Angeles County Clerk to deny marriage licenses to  
2 same sex couples, and Family Code sections 300 and 308.5, all operate to deny certain  
3 individuals the right to marry in violation of the Equal Protection Clause.

4           “Legislative classification is the act of specifying who will and who will not come  
5 within the operation of a particular law. (Citations omitted) A legislative classification  
6 satisfies equal protection of law so long as persons similarly situated with respect to the  
7 legitimate purpose of the law receive like treatment. (Citation omitted) Legislative  
8 classifications generally are entitled to judicial deference, are presumptively valid, and may  
9 not be rejected by the courts unless they are palpably unreasonable. (Citations omitted)  
10 However, *judicial deference does not extend to laws that employ suspect classifications,*  
11 *such as race. Because suspect classifications are pernicious and are so rarely relevant to a*  
12 *legitimate governmental purpose (citation omitted), they are subjected to strict judicial*  
13 *scrutiny; i.e., they may be upheld only if they are shown to be necessary for furtherance of*  
14 *a compelling state interest and they address that interest through the least restrictive means*  
15 *available.”* Connerly v. State Personnel Bd., 92 Cal.App.4th 16, 32-3, 112 Cal.Rptr.2d 5, 19-  
16 20 (2001)

17           Plainly, the policy of the Clerk, Family Code section 300 and Family Code section  
18 308.5 all condition the right to marry upon the different genders of those who wish to marry  
19 one another. By the same token, same sex individuals are denied the right to marry because of  
20 their gender, i.e., one of the individuals in question is the “wrong” gender.

21           There is no compelling state interest in denying same sex couples the right to marry.  
22 Over the years, virtually every other discriminatory barrier to same sex relationships has been  
23 rejected on constitutional grounds. Yet, the bar to same sex marriage remains notwithstanding  
24 the lack of a legitimate compelling state interest in that bar.

25           We start with the proposition that homosexuality is certainly legal in this state. “The  
26 aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to  
27 the continuing struggle for civil rights waged by blacks, women, and other minorities.” Gay

1 Law Students Assn. v. Pacific Tel. & Tel. Co., 24 Cal.3d 458, 488, 156 Cal.Rptr. 14, 32  
2 (1979).

3 The Courts and Legislature have appropriately prohibited discrimination against  
4 homosexuals in a variety of contexts on public policy grounds. California's Fair Employment  
5 and Housing Act ("FEHA") makes it illegal to discriminate on the basis of sexual orientation  
6 in employment. In this regard, Government Code Section 12920 declares "the public policy of  
7 this state that it is necessary to protect and safeguard the right and opportunity of all persons to  
8 seek, obtain, and hold employment without discrimination or abridgment on account of  
9 ...sexual orientation.:" FEHA also "declares that it is against public policy to discriminate  
10 based on 'sexual orientation in housing accommodations....'" Konig v. Fair Employment and  
11 Housing Com'n, 28 Cal.4th 743, 747, 123 Cal.Rptr.2d 1, 4 (2002). Similarly, under the Unruh  
12 Civil Rights Act, California Civil Code section 51, businesses cannot discriminate against  
13 homosexuals in providing full and equal access to services. Scripps Clinic v. Superior Court,  
14 108 Cal.App.4th 917, 932, 134 Cal.Rptr.2d 101, 110 (2003).

15 Despite the recognition that homosexuals are entitled to equal protection of the laws,  
16 same sex couples are denied the right to marry. This denial is all the more incomprehensible  
17 in light of "the well-established public policy to foster and promote the institution of  
18 marriage." Marvin v. Marvin, 18 Cal.3d 660, 683, 134 Cal.Rptr. 815, 831 (1976). *Even*  
19 *prisoners have the constitutional right to marry!* In re Carrafa, 77 Cal.App.3d 788, 789, 143  
20 Cal.Rptr. 848, 849 (1978).<sup>4</sup>

21 Certainly, there is no compelling state interest in morality, child procreation, child  
22 bearing, or child rearing that would justify denying same sex couples the right to marry.<sup>5</sup> Any

23 \_\_\_\_\_  
24 <sup>4</sup> In that case, the Court of Appeals noted as follows: "The right of prisoners to marry has  
25 been codified (Pen.Code, ss 2600- 2601.)... The right to marry is a fundamental constitutional  
26 right. (Perez v. Sharp (1948) 32 Cal.2d 711, 714, 198 P.2d 17; Loving v. Virginia (1967) 388 U.S.  
1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010, 1018.) The codification of that right emphasizes its  
fundamental nature." 77 Cal.App.3d at 791, 143 Cal.Rptr. at 850-1.

27 <sup>5</sup> Once upon a time, the purpose of marriage was tied to procreation. In Baker v. Baker, 13  
28 Cal. 87 (1859), our Supreme Court stated: "Again, the first purpose of matrimony, by the laws of

1 such arguments are mooted, if not rendered absurd, by a plethora of decisions by the Courts.  
2 Those decisions hold, among other things as follows: (1) Unmarried persons are allowed to  
3 cohabit, engage in sexual relations and contract as to their obligations toward one another.  
4 Marvin v. Marvin, 18 Cal.3d 660, 134 Cal.Rptr. 815 (1976); (2) A couple does not need to be  
5 married in order to bear children; (3) Married (or unmarried) persons can bear children with  
6 the sperm or eggs of anonymous donors. See, e.g., Robert B. v. Susan B., 109 Cal.App.4th  
7 1109, 135 Cal.Rptr.2d 785, 786 (2003); (4) "California's adoption statutes have always  
8 permitted adoption without regard to the marital status of prospective adoptive parents."  
9 Sharon S. v. Superior Court, 31 Cal.4th 417, 433, 2 Cal.Rptr.3d 699, 711-2 (2003); (5)  
10 Gestational surrogacy contracts are valid in this state<sup>6</sup>. See e.g., Johnson v. Calvert, 5 Cal.4th  
11 84, 19 Cal.Rptr.2d 494 (1993); and (5) Children can legally be adopted by homosexuals.  
12 Sharon S. v. Superior Court, 31 Cal.4th 417, 422, 2 Cal.Rptr.3d 699, 702 (2003).

13 Putting aside procreation, it is clear that every justification for marriage between  
14 opposite gender couples applies equally to same sex couples. "It is instructive to consider the  
15 rationale behind the well-accepted maxim that marriage serves as the building block of  
16 society. One commentator did so by roughly classifying the functions served by marital  
17 relationships. First, they provide the setting for procreative activity and thus act as a  
18 transmitter of culture and a means to perpetuate society. Second, they serve as cooperative  
19 economic units which increase the well-being of the spouses as well as that of society. Third,  
20 they serve an emotional, psychological and sexual function. The importance of these functions  
21 to the individual and to society is what makes the relationship worthy of legal protection.  
22 Some cohabital relationships serve these functions to the same extent as do marriages, and are

23  
24  
25 nature and society, is procreation. A woman, to be marriageable, must, at the time, be able to bear  
26 children to her husband, and a representation to this effect is implied in the very nature of the  
27 contract."

28  
29 <sup>6</sup> In gestational surrogacy, and embryo created by the sperm of the father and the egg of the  
30 mother is implanted in woman other than the mother who gives birth to the child of the legal  
31 "parents." Johnson v. Calvert, *supra*.

1 thus equally deserving of legal recognition and protection.” Elden v. Sheldon, 46 Cal.3d 267,  
2 281, 250 Cal.Rptr. 254, 263 (1988), fn.1. It is simply beyond reasonable dispute that a same  
3 sex couple cannot meaningfully be distinguished from an opposite gender couple for purposes  
4 of transmitting culture/perpetuating society, for purposes of establishing cooperative  
5 economic units, and for purposes of serving an emotional, psychological or sexual function.

6 Clearly, individuals involved in same sex relationships cannot marry in this County as  
7 a result of the policy of the County Clerk, and/or as a result of the import of Family Code  
8 sections 300 and 308.5. For the reasons set forth above, it is respectfully submitted that there  
9 is no compelling state interest in denying same sex couples the fundamental constitutional  
10 right to marry that is afforded to opposite gender couples. Thus, petitioners have stated a  
11 claim for denial of equal protection of the laws under the California Constitution. <sup>7</sup>

12 (E) **Because of the unique status of marriage, and the public interest in the**  
13 **subject matter of this Petition, mandamus is appropriate**

14 Under the heading “*The Unique Status of Marriage*” (emphasis in original), the Court  
15 in In re Marriage of Haines, 33 Cal.App.4th 277, 287-8, 39 Cal.Rptr.2d 673, 679-80 (1995)  
16 observed: “It is the public policy of this state ‘to foster and promote the institution of  
17 marriage.’...‘[T]he structure of society itself largely depends upon the institution of  
18 marriage....’... ‘It is fundamental that a marriage contract differs from other contractual  
19 relations in that there exists a definite and vital public interest in reference to the marriage

20 \_\_\_\_\_  
21 <sup>7</sup> They have at the same time, and by the same evidence, established a claim for denial of  
22 substantive due process. “Substantive due process prohibits governmental interference with a  
23 person's fundamental right to life, liberty or property by unreasonable or arbitrary legislation.” In re  
24 David B., 91 Cal.App.3d 184, 192, 154 Cal.Rptr. 63, 68-9 (1979) Under substantive due process,  
25 fundamental rights cannot be denied or interfered with in the absence of a “compelling state  
26 interest.” Id. “Substantive due process, on the other hand, deals with protection from arbitrary  
27 legislative action, even though the person whom it is sought to deprive of his right to life, liberty  
28 or property is afforded the fairest of procedural safeguards. In substantive law such deprivation is  
supportable only if the conduct from which the deprivation flows is prescribed by reasonable  
legislation reasonably applied, i.e., the law must not be unreasonable, arbitrary or capricious but  
must have a real and substantial relation to the object sought to be attained.” Gray v. Whitmore, 17  
Cal.App.3d 1, 21, 94 Cal.Rptr. 904, 915 (1971).

1 relation....”...’ ““The laws relating to marriage and divorce...have been enacted because of the  
2 profound concern of our organized society for the dignity and stability of the marriage  
3 relationship. This concern relates primarily to the status of the parties as husband and wife.  
4 The concern of society as to the property rights of the parties is secondary and incidental to its  
5 concern as to their status.’...” “Marriage is a matter of public concern. The public, through  
6 the state, has interest in both its formation and dissolution.... The regulation of marriage and  
7 divorce is solely within the province of the Legislature except as the same might be restricted  
8 by the Constitution.”...”

9 At this time, the subject of same-sex marriage is receiving massive media attention. A  
10 great number of individuals desire to marry, but are prevented from doing so by policies of the  
11 County Clerk, and by the provisions of sections 300 and 308.5 of the Family Code. Recent  
12 events in the City of San Francisco, and pronouncements on the subject by President Bush, all  
13 underscore the statewide interest and importance of these issues. With each day that passes,  
14 individuals are denied a right of constitutional dimension that has judicially been declared to  
15 be unique. Under these circumstances, remedies at law must be deemed inadequate.

16 “The public importance of the matter litigated can be a significant factor affecting a  
17 court’s determination concerning the adequacy of alternative legal remedies.” 31 California  
18 Forms of Pleading and Practice, Ch. 358, “Mandate and Prohibition”, at page 36. “When the  
19 validity of a public agency's action is at issue, the public interest in a speedy determination of  
20 the matter may also make an appeal inadequate.” City of Oakland v. Superior Court, 45  
21 Cal.App.4th 740, 751, 53 Cal.Rptr.2d 120, 127 (1996). “[A ]writ of mandate should not be  
22 denied when ‘the issues presented are of great public importance and must be resolved  
23 promptly.’” Corbett v. Superior Court, 101 Cal.App.4th 649, 657, 125 Cal.Rptr.2d 46, 50  
24 (2002). “The public welfare thus requires an early resolution which can be achieved only by  
25 mandamus in the interest of orderly compliance with and administration of the particular  
26 laws.” Brown v. Superior Court, 5 Cal.3d 509, 515, 96 Cal.Rptr. 584, 587 (1971).

1 IV.

2 IN THE ALTERNATIVE, PETITIONERS ARE ENTITLED TO INJUNCTIVE  
3 RELIEF

4 A mandamus petition can also seek injunctive relief. Camp v. Board of Supervisors,  
5 123 Cal.App.3d 334, 355-6, 176 Cal.Rptr. 620, 634 (1981). "The elements of a cause of  
6 action for injunctive relief are (1) a tort or other wrongful act constituting a cause of action  
7 (citation omitted); and (2) irreparable injury." Brownfield v. Daniel Freeman Marina Hospital,  
8 208 Cal.App.3d 405, 410, 256 Cal.Rptr. 240, 243 (1989). The same facts and arguments  
9 which were advanced in connection with the prayer for mandamus apply equally with respect  
10 to injunctive relief.

11 V.

12 CONCLUSION

13 The laws of this state profess to (1) promote the institution of marriage and (2) combat  
14 discrimination against homosexuals. Yet, for no compelling (or even logical) reason, the laws  
15 of this state exclude sex couples the fundamental constitutional right to marry. By virtue of  
16 this distinction, same sex couples are stigmatized and treated as second class citizens. Indeed,  
17 they are denied a fundamental right that is even afforded to prisoners.

18 The current state of affairs presents a classic denial of equal protection. Under the  
19 circumstances, a writ of mandamus or prohibition should issue to stop the daily violation of  
20 our constitution, and the accompanying denial of dignity.

21 DATED: February 26, 2004

ALLRED, MAROKO & GOLDBERG  
GLORIA ALLRED  
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23 

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1 PROOF OF SERVICE

2  
3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18  
5 and not a party to the within action; my business address is: 6300 Wilshire Boulevard, Suite 1500,  
6 Los Angeles, California 90048.

7 On February 27, 2004, I served the foregoing document described as PETITIONERS  
8 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR  
9 WRIT OF MANDATE OR PROHIBITION on the interested parties in this action

10 [X] by placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed  
11 as indicated on the attached Mailing List

12 [X] BY MAIL: I caused such envelope with postage thereon fully prepaid to be placed in the  
13 United States mail at Los Angeles, California.

14 [ ] BY PERSONAL SERVICE: I caused such envelope to be hand-delivered to the offices  
15 of the addressee(s).

16 [ ] BY FAX: by transmitting a true copy via facsimile transmission from telecopier number  
17 (323) 653-1660 located at 6300 Wilshire Blvd., Ste. 1500, Los Angeles, California 90048,  
18 to the following:

19 Executed on February 27, 2004, at Los Angeles, California.

20 [X] (State) I declare under penalty of perjury under the laws of the State of California that the  
21 above is true and correct.

22 [ ] (Federal) I declare that I am employed in the office of a member of the bar of this Court at  
23 whose direction the service is made.

24 Angelica O. Paz

25   
26 SIGNATURE  
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MAILING LIST  
ROBIN TYLER, et al. v. THE COUNTY OF LOS ANGELES  
CASE NO. BS 088 506

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1 **PROOF OF SERVICE**

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3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 I am employed in the County of Los Angeles, State of California. I am over the age of  
5 18 and not a party to the within action; my business address is: 6300 Wilshire Boulevard,  
6 Suite 1500, Los Angeles, California 90048.

7 On **September 20, 2004**, I served the foregoing document described as NOTICE OF  
8 LODGING OF "MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
9 PETITION FOR WRIT OF MANDATE OR PROHIBITION" BY THE PETITIONERS IN  
10 THE TYLER-OLSON ACTION (LASC CASE NO. BC 088 506) FOR RESPONSE IN THE  
11 COORDINATED MARRIAGE CASES PROCEEDING on the interested parties in this  
12 action

13  by placing  the original  a true copy thereof enclosed in a sealed envelope  
14 addressed as indicated on the attached Mailing List

15  **BY MAIL:** I caused such envelope with postage thereon fully prepaid to be placed in  
16 the United States mail at Los Angeles, California.

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18 offices of the addressee(s).

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20 number (323) 653-1660 located at 6300 Wilshire Blvd., Ste. 1500, Los Angeles,  
21 California 90048, to the following:

22 Executed on **September 20, 2004**, at Los Angeles, California.

23  (State) I declare under penalty of perjury under the laws of the State of California that  
24 the above is true and correct.

25  (Federal) I declare that I am employed in the office of a member of the bar of this  
26 Court at whose direction the service is made.

27 Jennifer Angell

28   
SIGNATURE

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